



Billing Code: 3410-30-P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 278 and 279

[FNS-2018-0021]

RIN 0584-AE63

Taking Administrative Actions Pending Freedom of Information Act (FOIA)

Processing

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Proposed rule.

SUMMARY: The Food and Nutrition Service (FNS) seeks to prevent firms authorized to participate in the Supplemental Nutrition Assistance Program (SNAP or the Program) from delaying administrative actions, such as disqualification or civil money penalties, through submission of Freedom of Information Act (FOIA) requests or appeals. As such, FNS is proposing that FOIA requests and FOIA appeals be processed separately from administrative actions FNS takes against retail food stores. This proposed rule would ensure that retail food stores can no longer use the FOIA process to delay FNS' administrative actions to sanction a retail food store for SNAP violations.

DATES: Written comments must be received on or before [insert date 60 days after date of publication in the Federal Register] to be assured of consideration.

ADDRESSES: The Food and Nutrition Service, USDA, invites interested persons to submit written comments on this proposed rule. Comments may be submitted in writing by one of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- Mail: Comments should be addressed to Vicky T. Robinson, Chief, Retailer Management and Issuance Branch, Retailer Policy and Management Division, Rm. 418, 3101 Park Center Drive, Alexandria, Virginia 22302.

All written comments submitted in response to this proposed rule will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. FNS will make the written comments publicly available on the Internet via <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Vicky Robinson, Chief, Retailer Management and Issuance Branch, Retailer Policy and Management, 4th Floor, 3101 Park Center Drive, Alexandria, Virginia 22302, by phone at 703-305-2476, or by e-mail at vicky.robinson@fns.usda.gov.

SUPPLEMENTARY INFORMATION:

Background

FNS disqualifies firms that violate Program rules from SNAP participation by issuing a charge letter, examining the firm's response to the charges, determining based on the evidence whether the firm violated Program rules, and, if appropriate, informing the firm of any sanctions imposed. The regulations at 7 CFR 278.6 require that the charge letter specify the violations or actions which constitute the basis for disqualification from SNAP or imposition of a civil money penalty. The basis of evidence may include facts established through on-site investigations, inconsistent SNAP redemptions, or transaction data obtained through the electronic benefit transfer (EBT) system. A firm charged with SNAP violations has 10 days to respond to the charge letter. FNS reviews and considers the firm's response to the charge letter before determining whether the firm violated any provisions of the Food and Nutrition Act (the Act) or regulations. If FNS determines that the firm has violated any provision of the Act or regulations, FNS will issue a notice of determination to the firm. In accordance with section 14(a)(18) of the Act, for firms that have been disqualified for trafficking, one of the most serious offenses in the SNAP program, the disqualification becomes effective immediately upon the date of receipt of the notice of determination.

Firms charged with SNAP violations receive extensive procedural protections through administrative and judicial review. Section 14 of the Act and the regulations at 7 CFR part 279 provide retail food stores disqualified from the Program an opportunity to file a request for administrative review within 10 days of the date of delivery of the notice of determination. The request for administrative review allows a firm to submit additional

information in support of its position to FNS. If the Agency determination is upheld in administrative review, the determination is final. Unless the firm had been disqualified for trafficking, the disqualification takes effect 30 days after the date of delivery of the final determination.

For retail food stores who feel aggrieved by the final determination, the Act and regulations allow such retail food stores to file a complaint against the United States to obtain judicial review of the final determination within the 30 days of the date of delivery of the final determination. The firm's suit against in the United States is trial de novo and the firm may submit new information to the reviewing court, which determines the validity of the questioned administrative action.

The opportunity to present information in response to a charge letter or during the administrative review process is not an opportunity for discovery; however, the Agency currently holds possible sanctions until a FOIA request is processed. Under 5 U.S.C. 552, any person has the right to obtain access to Federal agency records, except to the extent that such records are protected from release by a FOIA exemption or exclusion. There are no FOIA-specific regulations for SNAP-authorized retail food stores. If a firm files a FOIA request or appeal after the firm is charged with violations, but before FNS issues a notice of determination, FNS currently holds in abeyance administrative action against the firm while the FOIA request and appeal is being processed, allowing the firm to continue redeeming SNAP benefits. Attorneys for some firms submit extensive and complex FOIA requests and appeals, and repeatedly ask for information that has been consistently denied when requested in prior cases, seemingly with the intention of delaying FNS' final determination to disqualify or impose a civil money penalty against

the firm. Information the firm may seek through FOIA is generally the same information requested through the discovery process at the judicial review level.

Retail food store case-specific FOIA requests appear to have become a tool used by retail food stores and their attorneys to delay FNS action on retail food stores violating Program rules. In Fiscal Year (FY) 2017, 437 SNAP retail food stores submitted FOIA requests to FNS after being charged with a SNAP violation. Holding SNAP administrative actions in abeyance during the processing of a firm's FOIA request or appeal has had a serious impact on SNAP integrity as violating firms have continued to participate in SNAP through the FOIA processing period.

As described earlier, in addition to the ten days from receipt of a charge letter that a retail food store has to respond, the statute provides the retail food store another ten days from receipt of a notice of determination to request administrative review and submit further information in support of its position before the determination is made final. However, by statute, permanent disqualification for trafficking in SNAP benefits goes into effect upon receipt of the FNS notice of determination, regardless of whether the firm makes a timely request for administrative review of that determination.

Based on these statutory provisions, it is clear that congressional intent is to remove violating firms from the program in a timely and expeditious manner. By ensuring that the FOIA process is separate from the administrative determination process, this proposed rulemaking would align FNS procedures with congressional intent.

To ensure that any request for records through FOIA does not delay the effective date of the administrative determination, FNS proposes to amend language at 7 CFR 278.6(p), 279.4(c), and 279.6(b) to provide that any filed or pending FOIA request or appeal will

not affect when the Agency takes administrative action against a firm determined to have violated SNAP statute or regulations. The proposed rule will have a prospective effect, meaning the Agency would continue processing existing FOIA requests or appeals but would not delay SNAP administrative determinations in any cases.

Regardless of whether the retail food store submits a FOIA request or appeal during the FNS administrative process, in accordance with existing statute and regulations, the action to permanently disqualify a retail food store for trafficking would take effect immediately upon the date the store receives the notice of determination. Determinations to temporarily disqualify or impose a civil money penalty in lieu of disqualification will take effect 10 days after the firm receives the FNS notice of determination, unless the firm makes a timely request for administrative review. For cases other than those involving trafficking, the final agency determination made after the administrative review has been completed would take effect 30 days after the date of delivery of the determination to the firm. Except for firms disqualified from SNAP due to being disqualified from the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), firms will retain their right to administrative and judicial review of the determination made, in accordance with 7 CFR part 279. However, through this proposed action, any FOIA request or appeal filed or pending during the administrative or judicial review process would have no impact on when the agency can take administrative action.

Removing retail food stores from the Program at the point that FNS has determined, based on the evidence, that a store violated SNAP rules, will help ensure that the Program is conducted with integrity and that taxpayer dollars are being used as intended.

Procedural Matters

Executive Order 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This proposed rule has been determined to be not significant and was not reviewed by the Office of Management and Budget (OMB) in conformance with Executive Order 12866.

Executive Order 13771

Executive Order 13771 directs agencies to reduce regulation and control regulatory costs and provides that for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process. This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

Regulatory Impact Analysis

This rule has been designated as not significant by the Office of Management and Budget, therefore, no Regulatory Impact Analysis is required.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires Agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. Pursuant to that review, it has been certified that this rule would not have a significant impact on a substantial number of small entities.

While there may be some impact on small retail food stores, the impact is not significant. This proposed rule primarily impacts retail food stores that have been charged with SNAP trafficking and other violations and FOIA officials at the federal level. The retail food stores this proposed rule would impact would no longer be able to delay an FNS determination by submitting FOIA requests. The proposed rule would prompt the FNS notice of determination to be issued in a timely manner.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures by State, local or tribal governments, in the aggregate, or the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule.

This proposed rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and tribal governments or the private sector of \$100 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

The Supplemental Nutrition Assistance Program is listed in the Catalog of Federal Domestic Assistance under Number 10.551 and is not subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under Section (6)(b)(2)(B) of Executive Order 13132.

The Department has considered the impact of this rule on State and local governments and has determined that this rule does not have federalism implications. Therefore, under section 6(b) of the Executive Order, a federalism summary is not required.

Executive Order 12988, Civil Justice Reform

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local

laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This rule is not intended to have retroactive effect unless so specified in the Effective Dates section of the final rule. Prior to any judicial challenge to the provisions of the final rule, all applicable administrative procedures must be exhausted.

Civil Rights Impact Analysis

FNS has reviewed this proposed rule in accordance with USDA Regulation 4300-4, “Civil Rights Impact Analysis,” to identify any major civil rights impacts the rule might have on program participants on the basis of age, race, color, national origin, sex or disability. After a careful review of the rule’s intent and provisions, FNS has determined that this rule is not expected to affect the participation of protected individuals in the Supplemental Nutrition Assistance Program.

Executive Order 13175

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. We are unaware of any current Tribal laws that could be in conflict with this rule.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; 5 CFR part 1320) requires the Office of Management and Budget (OMB) to approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number.

This rule does not contain information collection requirements subject to approval by the Office of Management and Budget under the Paperwork Reduction Act of 1994.

E-Government Act Compliance

The Department is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects

7 CFR Part 278

Banks, banking, Food stamps, Grant programs-social programs, Penalties, Reporting and recordkeeping requirements, Surety bonds.

7 CFR Part 279

Administrative practice and procedure, Food stamps, Grant programs-social programs.

Accordingly, 7 CFR parts 278 and 279 are proposed to be amended as follows:

1. The authority citation for 7 CFR parts 278 and 279 continues to read as follows:

Authority: 7 U.S.C. 2011–2036.

**PART 278-- PARTICIPATION OF RETAIL FOOD STORES, WHOLESALE
FOOD CONCERNS AND INSURED FINANCIAL INSTITUTIONS**

2. In §278.6, add paragraph (p) to read as follows:

**§278.6 Disqualification of retail food stores and wholesale food concerns, and
imposition of civil money penalties in lieu of disqualifications.**

* * * * *

(p) *Freedom of Information Act (FOIA) requests.* A FOIA request for records or FOIA appeal shall not delay or prohibit FNS from taking administrative action against a firm under this part, or delay the effective date of the FNS administrative action.

**PART 279—ADMINISTRATIVE AND JUDICIAL REVIEW—FOOD
RETAILERS AND FOOD WHOLESALERS**

3. Revise §279.4 by adding a new sentence before the last sentence of paragraph (c) to read as follows:

§279.4 Action upon receipt of a request for review.

* * * * *

(c) * * * FNS may not grant extensions of time or hold the administrative review process in abeyance solely on the basis of a pending FOIA request for records or FOIA appeal.

* * *

4. Revise §279.6 by adding a new sentence before the last sentence of paragraph (b) to read as follows:

§279.6 Legal advice and extensions of time.

* * * * *

(b) * * * The designated reviewer may not grant extensions of time or hold the administrative review process in abeyance solely on the basis of a pending FOIA request for records or FOIA appeal. * * *

Dated: February 12, 2019.

Brandon Lipps
Administrator
Food and Nutrition Service

[FR Doc. 2019-02577 Filed: 2/15/2019 8:45 am; Publication Date: 2/19/2019]